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IN THE

Supreme Court of the United States

October Term, 1949.

No. 163.

COMMODITIES TRADING CORPORATION, *et al.*,
Plaintiffs in Error,

vs.

THE UNITED STATES,
Defendant in Error.

No. 156.

THE UNITED STATES,
Plaintiff in Error,

vs.

COMMODITIES TRADING CORPORATION
and others,
Defendants in Error.

Brief for Commodities Trading Corporation, et al., Plaintiffs Below, and Plaintiffs in Error in No. 163 and Defendants in Error in No. 156.

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I.

Opinions Below.

The prevailing and dissenting opinions of the Court of Claims are reported in 83 Fed. Supp. 356.

II.

Jurisdiction.

The Statutory provision believed by the petitioners to sustain jurisdiction of this Court is Title 28, U. S. Code Annotated, Section 288, as provided by the Act of February 13th, 1925, Chapter 229, Sec. 3; 43 Stat. 939.

2. The Statute involved is Public Law 274, 77th Congress, approved October 16, 1941, Chapter 445, as amended by Public Law 507, 77th Congress, approved March 27, 1942; Public Law 104, 78th Congress, approved June 30, 1943. The pertinent provisions of this Statute are as follows:

> "That whenever the President, during the national emergency declared by the President on May 27, 1941, but not later than June 30, 1944, determines that (1) the use of any military or naval * * * supplies * * * is needed for the defense of the United States; (2) such need is immediate and impending and such as will not admit of delay or resort to any other source of supply; and (3) all other means of obtaining the use of such property for the defense of the United States upon fair and reasonable terms have been exhausted, he is authorized to requisition such property for the defense of the United States upon the payment of fair and just compensation for such property to be determined as hereinafter provided, * * *. The President shall determine the amount of the fair and just compensation to be paid for any property requisitioned and taken over pursuant to this Act, * * * but each such determination shall be made as of the time it is requisitioned * * * in accordance with the provision for just compensation in the

Fifth Amendment to the Constitution of the United States. If, upon any such requisition of property, the person entitled to receive the amount so determined by the President as the fair and just compensation for such property, is unwilling to accept the same as full and complete compensation for such property, he shall be paid 50 per centum of such amount and shall be entitled to sue the United States in the Court of Claims or in any district court of the United States in the manner provided by Sections 24 (20) and 145 of the Judicial Code (U. S. C., 1934 ed., title 28, secs. 41 [20] and 250) for an additional amount which, when added to the amount so paid to him, he considers to be the fair and just compensation for such property. * * * "

3. The judgment of the United States Court of Claims was rendered on the 4th day of April, 1949 (R. 25). This petition was docketed on the 5th day of July, 1949, the 3rd and 4th of July, 1949 being legal holidays.

4. The basic question relied upon by the petitioners to induce this Court to review the decision of the Court of Claims is the question of the value of property requisitioned by the United States Government from the plaintiffs where, by reason of price ceilings and restrictions instituted and enforced by the defendant, there did not exist any free market in the United States for the property requisitioned, but where the property was non-perishable and could have been retained by the Plaintiffs until after the War was over and the price restrictions removed, and in fact was intended to be so retained when purchased, and when a value based upon each suggested measuring stick, except that of ceiling price, was considerably in excess of the value found by the Court of Claims.

III.

Statement of the Case.

This matter comes before this Court upon the Petition of Certiorari to the Court of Claims presented by Commodities Trading Corporation and others plaintiffs below and filed July 5th, 1949, in Case No. 163; and upon Petition of the United States, defendant below, filed July 2nd, 1949, in Case No. 156, both of which Petitions were granted by this Court on October 24th, 1949.

To avoid confusion, the parties will be referred to hereinafter as "Commodities" and "The United States" as each is both plaintiff in error and defendant in error.

This suit was brought by the plaintiffs in error, Commodities Trading Corporation and Irving Trust Company against the United States to recover just compensation for 759,750.88 pounds of Whole Black Pepper requisitioned by the United States from the Commodities Trading Corporation on or about May 26th, 1944 (R. 7-10). The plaintiff in error, Commodities Trading Corporation, hereinafter called "Commodities", owned the said pepper, and the Irving Trust Company had a lien on said pepper for bank loans made by it to Commodities on the security of said pepper (Spec. Fdgs. Nos. 4 and 5, R. 13-14).

The other plaintiffs in error are stockholders of Commodities, who received fractional parts of the claim sued on herein upon the dissolution of Commodities on or about January 22nd, 1946, and who intervened as parties plaintiff in March 1948 (Spec. Fdgs. Nos. 1 and 2, R. 12-18).

The War Department requisitioned the pepper pursuant to the Act of October 16th, 1941 (55 Stat. 742), as amended, and on September 25th, 1945, tendered Commodities $50,266.76 as just compensation, the said amount being based on the ceiling price for such pepper in effect

at the time of taking, as established by Maximum Price Regulation No. 52 (Spec. Fdgs. 3, 4, 6-7, R. 13, 14 and 15).

Commodities declined to accept the said determination of just compensation, claiming that the pepper requisitioned was, on the date of the taking, worth at least $190,000 (Spec. Fdgs. 6 and 7, R. 14, 15).

The Army proceeded to seize the pepper without making the payment provided for by said 55 Stat. 742, and Commodities brought suit on the 3rd day of October, 1945 (R. 1-5), for $190,000. with interest which it alleged was a minimum allowance for just compensation. On the 27th day of November, 1945, two months thereafter, and eighteen months after seizure, one-half of the award offered by the War Department, with 4% interest, or $26,404.41, in all, was paid to Commodities (Spec. Fdg. ..., R. 14 and 15). The said $190,000 and interest, less the said sum of $26,404.41, with interest paid as above stated, is therefore the amount involved in this suit.

At the time of taking and for many months before and for several months thereafter, there was no market for whole black pepper in the United States and not a pound thereof had been offered for sale (Spec. Fdg. 19, R. 19). Therefore, recourse must be had to other factors to show value, or just compensation.

The Government asserts that the ceiling price of 6½¢ per pound fixed in January, 1942 is the only measure of just compensation, and that the following bases of value submitted by Commodities should be ignored:

> (a) the market price in India in May 1944 of 21¢ for Whole Black Pepper delivered in New York, insurance and freight paid (Spec. Fdg. No. 23, R. 21, R. 41-42) (considered at pages 46 to 47, *infra*); or
>
> (b) the price which, in May 1944, it was reasonable to expect, could be obtained for Whole Black

Pepper at the end of price control, less carrying charges to that time, pepper being non-perishable and easily stored (Spec. Fdg. No. 25, R. 22), a price far in excess of 21¢ (Spec. Fdg. No. 17, R. 18, 40) (considered at pages 53 to 56, *infra*); or

(c) the price at which it was reasonable to estimate that said pepper would have sold in the open market in New York in May 1944, had there been no War, a price in excess of 20¢ (Spec. Fdgs. 26, 15-17, R. 18, 22-23, 40, 42-43, 50, 65-70, 81-82, 85-87, 99-102, Tr. 35-37, 141-143) (considered at pages 48 to 53);

(d) Replacement cost—more than 50¢ per pound (Spec. Fdg. 17, R. 18, 56, 79) (considered at pages 53 to 57, *infra*); or

(e) the net price for its pepper which could have been obtained in May 1944 through the use of said Whole Black Pepper in producing synthetic or imitation pepper and the sale of said imitation pepper at the ceiling price established therefor by the Office of Price Administration, a price in excess of 30¢ (Spec. Fdg. No. 18, R. 18-19) (considered at pages 57 to 58, *infra*); or

(f) Commodities out-of-pocket cost plus an allowance for gratuitous services rendered over eight years by its officers an amount in excess of 20¢ (Spec. Fdg. No. 24, R. 21-22) (considered at pages 58 to 60).

The Court of Claims found that the value of the pepper was 15¢ a pound (Spec. Fdg. No. 27, p. 23), or about 7¢ a pound less than the lowest value which could have been found on any one of the above bases.

This was a compromise, as stated by the Court of Claims itself. It took into account some of the above

enumerated factors (a) to (f) *supra* but then considered sales made at 10¢ after October 1944 under compulsion and under special agreement with O.P.A. and other sales at 14.19¢ and 16¢ in 1945 and 1946, respectively (Spec. Fdgs. 19 & 20, R. 19 and opinion of Court of Claims R. 27).

As the Complaint asks for compensation at the rate of only 22 cents per pound, the fact that some of the bases mentioned in (a) to (f) above would support a much higher price is immaterial.

Facts.

Most of the facts hereinafter referred to were found by the Court. There was no contradiction of Commodities' evidence and the facts referred to but not found were proven by the undisputed evidence and errors were assigned for the failure of the Court of Claims to so find.

Ceiling prices were fixed by the Office of Price Administration for Whole Black Pepper as follows:

On December 11, 1941 Price Schedule 52 was issued establishing a ceiling price of 6.75¢ a pound, ex dock or warehouse, New York City (Spec. Fdg. 9, R. 15). This was the market price the day after Pearl Harbor (R. 59).

On February 3, 1942 said Schedule 52 was amended and the ceiling price fixed at 6.50¢ per pound (Spec. Fdg. 12, R. 17). This was the approximate market price at the date of fixation (R. 88).

In October, 1944, said Price Schedule was again amended and a ceiling price of 10¢ per pound was fixed Spec. Fdg. 19, R. 19).

In March, 1946 said Schedule was further amended and a ceiling price of 16¢ was fixed (Spec. Fdg. 19, R. 19).

Immediately after the removal of Price Ceilings in August, 1946, Whole Black Pepper was actively sold and traded in at 50¢ to 60¢ per pound and upward (Spec. Fdg. 17, R. 18).

It had risen to 80¢ per pound when this trial began, the 30th day of May, 1947 (R. 40, 80) and is now $1.00 per pound.

In 1941, when the War clouds over the East Indies, where pepper of the kind here in question is produced, began to become ominous the war frightened East Indians dumped their pepper on the New York market, which was the only place open to them (R. 108). Mr. Leon Henderson, the first head of O.P.A., published a strong statement in criticism of the purchasers of pepper and required the New York Produce Exchange, which was the market in which contracts for future delivery of pepper were made, to increase its margin four-fold, making the margin requirement nearly 100% of the market price of the pepper (R. 109, 89-90).

However, despite these two factors which operated strongly to depress prices, they rose from 4.1 cents per pound in January 1941 to 6.75 cents per pound at the time of Pearl Harbor (Spec. Fdgs. 9 and 10, R. 15-16).

It was three or four months after Pearl Harbor before the Dutch Indies were actually invaded and during this time the shipment into the United States, or the so-called "dumping", was carried on at a high rate (R. 108).

As a result there was piled up in the hands of importers in the United States from 78,000,000 to 100,000,000 pounds of Whole Black Pepper by March, 1942 (Fdg. 8; R. 15). This was a three years supply for continental United States under ordinary circumstances (Fdg. 8, R. 15).

Largely because of this glut of pepper, but partly because of the actions taken by Mr. Leon Henderson (R. 109, 89-90) and the establishment of a ceiling price which discouraged holders and caused many to sell out (Spec. Fdg. 11, R. 16), as above stated, there was a depressed

market, both in December 1941 and February and March 1942.*

In March 1942 the Japanese invaded the Dutch East Indies and the United States was cut off from supplies of pepper from all pepper producing countries except British India (R. 45). It soon became evident that the said 78,000,000 to 100,000,000 pounds was inadequate to supply the United States and South America, Canada and other countries which the United States, either under the good neighbor policy, or by reason of its alliance with England, was supplying (Spec. Fdg. 13, R. 17-18, 70). By September, 1943, there were only 30,000,000 pounds of Whole Black Pepper left in the hands of importers in the United States (Fdg. 14; R. 18, 61).

This reduction had taken place despite the fact that rationing had brought down to only 40 per cent of normal prewar consumption the amount of pepper which could be bought or sold (Spec. Fdg. 13; R. 17-18).

During the said period from February 3rd, 1942 to May, 1944, a great scarcity of pepper had been created throughout the whole world and despite exports from the United States, in some countries, where there was no ceiling price, the market price was as much as $2.00 per pound (R. 41, 44, 48, 55, 56, 61-62, 72, 78, 79).

By March, 1944, the shortage of pepper in the United States had become so great that the Department of Agriculture sought to requisition practically the entire 30,000,000 pounds, or thereabouts, left in the country, but was enjoined by Commodities (R. 131).

To meet the acute shortage large quantities of pepper were ground and mixed with parched corn or cottonseed

*Though the value of Lampong pepper produced in Sumatra is the same as the Indian peppers, Malibar, Alleppy and Tellicherri (R. 39) the O.P.A. price, which was based on market was one-third greater for the Indian pepper than for the Lampong pepper (O.P.A. Reg. 52). Of course, the danger of immediate invasion was much greater in the case of Sumatra than in that of British India.

hulls and the mixture, one-quarter or less real pepper and three-quarters or more neutral agents, was called synthetic or imitation pepper, and was sold at 16¢ a pound and more under ceiling prices fixed therefor by O.P.A. at the same time that it was maintaining the 6½¢ per pound for whole real pepper (Spec. Fdg. 18, R. 18-19, 106). The cost of grinding is less than ½¢ per pound (R. 106).

A simple calculation shows that the sellers of imitation pepper realized about 30¢ net per pound for the pepper contained in the concoction.

As may be imagined, the 6½ cent O.P.A. ceiling price was not in keeping with the above described conditions and in the language of one of the witnesses, O.P.A. "prevented" a market. What happened to the market more in detail is as follows:

Following March 1942, there was considerable activity in the pepper market, due to the fact that the importers of pepper who were mostly little people, when faced with ceiling prices, sold out (Fdgs. 11 & 15). However, this selling dried up quickly, and after the middle of 1942, there were few sales (Spec. Fdgs. 11 & 15, R. 16 & 18).

From January 1944 to October, when the ceiling price was raised to 10 cents, as above stated, there were no offers whatever of whole black pepper (Spec. Fdg. 19, R. 19) and this condition had continued to practically the same extent since September 1943 (Spec. Fdg. 14, R. 18).

During this period of great shortage, there were large supplies of pepper, of the kind here in question, in British India, which was the largest producer of black pepper next to Sumatra, Dutch East Indies, and, in fact, was the only other large producer of pepper (Fdg. 23, R. 21). 20 million pounds of this pepper was available for shipment to the United States, the Joint Food Control Board of England and the United States having allocated for exportation to the United States 10 million pounds in 1943 and 10 million in 1944 (Spec. Fdg. 23, R. 21).

While there was no ceiling price in India, and the Indians could trade among themselves and were themselves large users of pepper, the market price of Indian pepper delivered in New York was only 21 cents per pound against a selling price in South America of $2.00 due to the fact that the British Government restricted the exportation of pepper and permitted shipments only to such points and in such quantities as the British Government considered was in the interest of the War economy (Spec. Fdg. 23, R. 21, 41-43, 72, 78-80). All or any part of the 20 million pounds above referred to was available for importation into the United States in May, 1944 (Fdg. 23). But O.P.A. refused to permit the importation of any of this pepper in 1943 and 1944 and not a pound of this was admitted until 1945 (Spec. Fdg. 23, R. 21, 80).

Whole Black Pepper is not perishable and lasts for many decades (Fdg. 25). It is easily stored and the cost of storage was ½ cent per pound per year, as stated by Commodities and as found by the Court of Claims (Spec. Fdg. 24, R. 21-22, 92). Mr. Bowles of O.P.A. stated it at only about ⅛th of a cent per year (R. 37). If Commodities had held its pepper until the end of price control, it could have received from 50 to 60 cents a pound therefor (Spec. Fdg. 17, R. 18).

While this was not known in a definite legal sense in May 1944, at that time the members of the Advisory Committee of the Spice Trade advised O.P.A. that the price could be kept between 20 and 30 cents a pound and a market could be maintained if it would permit the Indian pepper to come in, but that if the low ceiling prices were retained there would be a rebound to prices much higher than 30 cents a pound, upon the end of price control. O.P.A. retained its low prices and the rebound took place (Spec. Fdgs. 16, 17, R. 18).

Moreover, many factors existing in May 1944 showed the inevitability of a high price at the end of the War.

These included the world-wide shortage existing at that time (R. 41), the failure of the natives to plant new pepper vines for about five years immediately preceding the War, discussed shortly hereinafter (R. 101, 102), and the destruction of pepper and pepper vines by the Japanese invasion in March 1942 (R. 102). So even in May 1944 it was practically certain that Commodities could get several times the 6½¢ ceiling price if it kept its pepper until after the end of price control.

While the O.P.A. was adamant in refusing to increase its general ceiling price of 6½ cents, provided for by Reg. 52, there were many opportunities open to Commodities, and other importers of pepper, to sell at much higher prices without violating any O.P.A. Regulations. These opportunities existed in May 1944 and for many months before and after and included the following:

> Conversion to synthetic or imitation pepper and obtaining the equivalent of approximately 30 cents per pound, mentioned above (Spec. Fdg. 18, R. 18-19);
>
> Sales to Porto Rico, Hawaii and Alaska at O.P.A. ceiling prices more than twice the 6½ cent price (no export license required) (Spec. Fdg. 20, R. 19);
>
> Sales to South America at O.P.A. prices in some cases three times the said 6½ cent price, but licenses required from Department of Agriculture (R. 90-91, 71);
>
> Sales of less than one full bag (150 lbs.), Regulation 52 having exempted from its provisions quantities smaller than a full bag. Sales of such quantities could have been made generally with the consent of the Department of Agriculture. Moreover, according to a reasonable construction of its F.D.O. 19, no such consent was needed by Commodities. In any event, there were large classes to

which Commodities could have sold without any consent, such as the Red Cross, Steamship Companies and several other large classes of users (This is discussed in Point Sixth, *post*).

In addition to the above outline of the facts there is another important fact. Both the owner and the commodity were most unusual in some of their features which affect the question here involved in no small degree.

Commodities was an anomalous organization. It was an investor in pepper, not a dealer therein. It began in 1933 to accumulate a holding of fifteen million pounds of whole black pepper but the price fell and Commodities kept buying (Spec. Fdg. 5, R. 13-14, 52-53, 133-134).

By 1938 it had built up an inventory in the United States of twenty-five million pounds. It was no war speculator. It sold eight million pounds thereof prior to the outbreak of the War in December 1941 and repeatedly offered to sell at cost but it refused to sell at O.P.A. price and continued to hold the remainder and had about 60% of the thirty million pounds left in September, 1943, in the hands of importers in the United States (Spec. Fdgs. 5, 14, R. 13-14, 18).

Pepper is an unusual plant. It does not bear any fruit for the first four years, during which constant cultivation is required, but then has an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and lead to neglect of established vines (Fdg. 26, R. 22-23). For five years prior to the War there had been no planting and much neglect (R. 100-102, Fdg. 26, R. 22). This was due to the unprecedented drop in price—from 42¢ to 3¢ per pound caused by over planting (R. 43, 100-102).

Not a pound of pepper could have been produced in 1942, 1943, 1944 or 1945 from pepper vines which had not

been planted prior to the War and very little could have been produced from such vines prior to 1949 (R. 43, 66-68, 101-102; Spec. Fdg. 26, R. 22-23).

Moreover, as the pepper vine has an extreme average bearing life of only eleven years and an active bearing life of only seven years (R. 98-99, 107), the vines which had been planted in the 20s were already ceasing to bear, and this condition and a lessening supply of pepper was bound to result until seven years after new planting had been resumed. This had not taken place up to the Japanese invasion in March 1942 (R. 101-102). This peculiarity of the pepper plant is one of the important factors which made for high prices at the end of the War and has kept the price up to approximately One Dollar or more ever since (Spec. Fdg. 17, R. 18, 40).

The evidence showed that because of this peculiarity of the pepper plant and the failure of the natives to plant new vines, prices in May 1944 would have been in excess of 20 cents a pound, even if there had been no War and no Japanese destruction (Spec. Fdgs. 9, 26, R. 15-16, 22-23, 80-81).

IV.

Commodities expects to rely principally upon Specifications 1 to 31. It expects to review facts referred to in Specifications 31 to 61. These latter errors were all failures to find undisputed facts and will not be reprinted.

Specification of Errors.

The Court of Claims erred:

1. In failing to find that the fair value of 759,750.88 pounds of Whole Black Pepper, the subject of this action, was on May 26, 1944, the sum of $188,500 or 22 cents a pound and in finding instead that said fair value was $113,962.63 or 15¢ per pound.

2. In failing to find that the just compensation to which plaintiffs are entitled for said property requisitioned and payment by the United States therefor is 22¢ per pound, or a total of $188,500, together with interest at 4 per cent, (4%) per annum from May 26, 1944, as an element of just compensation, less the sum of $26,404.14 paid on November 27th, 1945, with interest thereon from the date of payment, and in finding or concluding instead:

> "* * * that the Commodities Trading Corporation, or its distributees, are entitled to recover, and it is therefore adjudged and ordered that Commodities Trading Corporation, or its distributees, are entitled to recover of and from the United States a total of one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) plus compensation for delay in payment computed at (4) per cent per annum on one hundred thirteen thousand nine hundred sixty-two dollars and sixty-three cents ($113,962.63) from May 26, 1944, to November 27, 1945, less the amount paid plaintiffs on the latter date of twenty-six thousand four hundred four dollars and fourteen cents ($26,404.14) and plus a further sum for delay in payment computed at four (4) per cent per annum on eighty-eight thousand eight hundred twenty-nine dollars and twenty-five cents ($88,829.25) from November 27, 1945, until paid" (R. 23).

3. In failing to find that the market price of Whole Black Pepper in British India on May 26, 1944, 21¢ per pound, delivered in New York, with freight and insurance paid, constituted a minimum measure of plaintiffs-petitioners' just compensation for the 759,750 pounds of Whole Black Pepper requisitioned by the United States Army from plaintiff, Commodities Trading Corporation, on the 26th day of May, 1944.

4. In failing to find that the "retention value" of plaintiffs-petitioners' said pepper, that is, the difference between the prices which it was reasonable to estimate on the 26th day of May, 1944, would exist at the end of the War and upon decontrol of pepper from Government fixed prices, less the estimated carrying charges from May 26th, 1944 to the expected end of the War and of decontrol, is a proper measure for determining the just compensation to plaintiffs for the pepper in question, seized by the United States Army, and that plaintiffs-petitioners are therefore entitled to recover the full amount demanded in the Complaint, or $190,000, with interest, less the payment of $26,404.14, with interest.

5. In failing to find that the price at which plaintiffs-petitioners could have replaced the said pepper at the first opportunity for so doing was in excess of 50 cents per pound, and that such replacement cost measures the just compensation to which plaintiffs-petitioners are entitled, and that as said replacement value is far in excess of the amount demanded in the Complaint, plaintiffs-petitioners are entitled to the full amount demanded therein.

6. In failing to find that the price at which it was reasonable to estimate in May, 1944, Whole Black Pepper would have sold at that time had there been no War, is a minimum measure of just compensation to plaintiffs-petitioners, which said price was in excess of 20 cents per pound.

7. In failing to find that the net amount which plaintiffs-petitioner could have realized from the use and sale of its pepper as the foundation for synthetic or imitation pepper constituted a factor for determining just compensation and required an allowance therefor of at least 22 cents per pound.

8. In failing to find that the average cost of all of plaintiffs-petitioners' pepper at the time of the requisition here in question was 14.59 cents per pound, and that the average cost of the pepper actually requisitioned was 14.59 cents per pound, and that such amount, plus a fair profit, was in excess of 20 cents per pound, and that such amount constitutes a minimum measure of just compensation.

9. In finding in its 24th Special Finding as follows:

"The total cost of the pepper to Commodities is as follows:

	Pounds	*Per pound*	*Total cost*
Original cost	773,201.00	$0.0621046	$53,143.13
Shrinkage	13,450.12	.....	.....
Cost of pounds delivered in May 1944	759,750.88	.069948	53,143.13
Carrying charges:			
Labor, handling at (average) per bag of .04422			$256.71
Cartage, etc., at (average) per bag of .076			442.31
Storage, at (average) per bag per month of .03			19,591.62
Bank interest, commissions, cables, exchange, etc., amounting to approximately 2.75% per annum			13,672.99
Insurance, at premiums of approximately $4.368 per $100 value for 9 years 4 months			3,377.34
Taxes, on basis of average stored pepper during period 1936 to 1943 inclusive...			1,076.67
Total direct costs			91,560.77

Allowance for general administrative expenses at 1% per annum during carrying period, of 9.33% on original cost of $53,143.13	4,958.25
Total costs plus estimated administration expense, or an average cost per pound of $0.127	96,519.02

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing expenses to Commodities during the period the pepper was purchased and held. No interest is computed upon costs of any of the carrying charges but only on Commodities' original costs" (R. 21-22).

10. In failing to find that on the 26th day of May, 1944, there was no market in Whole Black Pepper in the United States and none had been offered during any month of the year 1944 prior to October, when the O.P.A. raised the ceiling price to 10¢ per pound.

11. In finding that the ceiling price of 6.75¢ per pound for Whole Black Pepper was approximately the fair market price as of December 11th, 1941 (Spec. Fdg. No. 10, R. 16) and in failing to find that such market was a depressed one.

12. In finding that between September 30th, 1943 and the date of the requisition on May 26th, 1944, very little Whole Black Pepper was sold out of these inventories (inventories of importers) (Spec. Fdg. No. 14, R. 18).

13. In failing to find that the pepper sold by Commodities and referred to in Special Finding No. 19 (R. 19), sold under pressure and was not a voluntary sale (See Opinion of the Court).

14. In failing to find that the pepper sold by plaintiffs at 16¢ per pound, mentioned in said 19th Finding, was sold under pressure and was not a voluntary sale.

15. In finding that plaintiffs offered to sell 1,000,000 pounds of pepper to the Army at 9¾¢ per pound, as found in Finding No. 22 (R. 20).

16. In finding that between January 1st, 1943, and November 8th, 1943, plaintiff, Commodities Trading Corporation, had sold 98,267 pounds of Whole Black Pepper at 6.5¢ a pound (Spec. Fdg. No. 22, R. 20), and in failing to find that said sale was not voluntary, but was under pressure.

17. In failing to find in connection with the facts found in said Finding No. 26 (R. 22-23), that it is seven years after planting before pepper vines produce at a normal rate, and in finding in said 26th Finding that the pepper vine has a bearing period of from ten to fifteen years, with an average bearing period of about eleven years, and in failing to find that the total bearing period does not exceed eleven years, and that the period during which normal production continues does not exceed seven or eight years.

18. In finding in said 26th Finding that new plantings would have begun to bear about 1945 or 1946, and in failing to find that there were no new plantings of any consequence subsequent to 1937 and prior to the Japanese invasion in the Winter of 1942.

19. In failing to give sufficient effect to the market price in British India, at the date of requisition, in finding just compensation.

20. In failing to give sufficient effect in determining just compensation to the "retention value" of plaintiffs' pepper, based upon what plaintiffs could actually have

realized for their pepper at the end of price control, if it had not been seized by the Government.

21. In failing to give sufficient effect in determining just compensation to what plaintiffs could probably have received for their pepper upon the end of price control, veiewed from conditions as they existed at the time of requisition.

22. In failing to give sufficient effect in determining just compensation to the price which would have obtained in the United States in May 1944 and on May 26th of that year, if there had been no War.

23. In failing to give sufficient effect in determining just compensation to the replacement cost of the requisitioned pepper.

24. In failing to give sufficient effect in determining just compensation to cost plus reasonable profit.

25. In giving effect in its determination of just compensation to plaintiffs' offer to sell to the Army, referred to in Special Finding No. 22 (R. 20).

26. In giving effect to Commodities' petition for an amendment of Price Schedule 52, referred to in Special Finding No. 21 (R. 19-20) in finding the just compensation for the requisitioning of the pepper here in question.

27. In receiving in evidence Defendant's Exhibits Nos. 2, 3 and 4, over plaintiffs' objections (Tr. 199, 201).

28. In refusing to receive in evidence the affidavits of Fletcher H. Long and Ralph W. Olmstead, forming a part of Joint Exhibit "K" in Paragraph 15 of the Stipulation of Facts between the parties.

29. In refusing to receive in evidence Plaintiffs' Exhibit No. 5 for Identification.

30. In finding that part of Finding No. 23 (R. 21) wherein the Court found the market price of Indian pepper at 20¢ instead of 20.99 for May 1944.

31. In failing to find that on or about March 10, 1944, the United States, acting through the War Food Administrator, requisitioned, or attempted to requisition approximately 3,964,800 pounds of Whole Black Pepper owned by plaintiff.

FIRST POINT.

All of the questions raised in the following points are matters which this Court can and should consider.

Points Second, Third and Fourth discuss the intent of the War Powers Act of October 16, 1941 and the amendment thereof and the Emergency Price Control Act with respect to the right of Commodities to hold its pepper until the end of the War and with respect to the effect upon the compensation provided for by the War Powers Act of a ceiling price fixed under the authority of the Emergency Price Control Act.

The Fifth Point shows that there was no U. S. market and is based on the findings.

The Sixth Point discusses the decision of this Court in the *Felin* case, and argues that that decision does not indicate an intent on the part of this Court to limit just compensation by a ceiling price, especially not where the property is not perishable.

All of the other Points are directed in part towards sustaining the right of the Court of Claims to award as just compensation an amount in excess of that which would be paid at the O. P. A. ceiling price.

All of the Points, except the Second, Third, Fourth, Fifth, Sixth and last Points, are also directed to showing

that the finding by the Court of Claims of a value of only 15 cents per pound, and its judgment based thereon awarding just compensation at that rate was in the face of and in conflict with its subordinate findings which required the allowance of the full amount of 22 cents demanded in the complaint.

This is a pure question of law.

This Court said in *United States* v. *Esnault-Pelterie*, 303 U. S. 26, *supra*, at page 31:

> "We may, of course, inquire whether the subordinate or circumstantial findings made by the court below necessarily override its ultimate findings of fact and show that the judgment in point of law is not sustainable."

The Court of Claims found the market value of Indian Pepper delivered in New York in May, 1944 (Spec. Fdg. 23, R. 21), retention value (Spec. Fdg. 25, R. 22; Spec. Fdg. 17, R. 18) imitation pepper with a ceiling price of 16 cents per pound, only one-quarter of which or less was real pepper (Spec. Fdg. 18, R. 18-19) and several other bases for just compensation, each one of which required an award of the full amount demanded in the complaint. These are all discussed *infra*. But, in the face thereof, the Court of Claims awarded only 15 cents per pound. This is explained in its opinion in which it says (R. 27):

> "Taking into consideration Commodities' costs and the price it undoubtedly could have secured for its pepper had it been permitted to hold it until after restrictions had been removed, and also these sales at 10 cents, at 14.19 cents, and at 16 cents, we conclude that 15 cents a pound is just compensation. This allows plaintiff a little more than 2 cents a pound profit, and is 1½ cents a pound higher than

the average price at which pepper had sold over the last 75 years."

Commodities shows hereinafter that the 10, 14.19 and 16 cent prices were irrelevant and were erroneously taken into account and that its real cost was 20¢+.

SECOND POINT.

Commodities had the right and the opportunity to hold its pepper and to refuse to sell—certainly until it received a price that was fair.

The few facts referred to in this point which were not found are supported by the undisputed testimony and error was assigned for failure to find. (See assignments 35, 43.) The point and the facts are in support of an award above the ceiling price.

The Court of Claims found:

> "25. Whole black pepper is not perishable and will last unimpaired in quality for several decades" (R. 22).

The foundation of the Government's claim seems to be that Commodities, in time of War, had no right to continue to hold its pepper in the circumstances which had developed, but was obligated to sell it ,and to sell it at the ceiling price established by O.P.A. under the provisions of the Emergency Price Control Act passed January 30th, 1942. However, the very Act which the Government relies on provides in sub-division (d) of Section I, as follows:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

Moreover, this Court, in the *Yakus* and *Willingham* cases (321 U. S. 414, 321 U. S. 503), where *Yakus* and *Willingham* contended that the Emergency Price Control Act was unconstitutional and in violation of the Fourteenth Amendment of the Constitution because the ceiling prices fixed thereunder required owners of property to sell or rent at a loss, answered by referring to said Subdivision (d), and by saying that there was nothing in said Act or in any other law known to the Court, which compelled an owner to sell at a loss.* This must be the equivalent of not being required to sell at an unfair price.

Of course, the right of any owner is subject to the right of the Government to requisition for the defense of the country. In this case, the Government did requisition —under the provisions of the Act of October 16, 1941, as amended March 27, 1942. But this Act put safeguards around the seizing of private property even in times of War, and provided that just compensation must be paid therefor.

So just compensation must be determined by taking into account the restrictions on present sales, but also the right to retain and sell at some more propitious time.

Furthermore, by upholding the Constitutionality of the Price Control Act on the above ground, this Court confirmed the point that ceiling prices are not to be considered as identical with or as measuring true value or just compensation.

A taking of property is serious and compensation therefor is not to be determined by hasty Bureaucratic judgment fixing hundreds of ceiling prices in brief periods of time.

If any further confirmation of the above point is required it is furnished by the provisions for review of ceil-

*NOTE: The Government's contentions would force Commodities to sell at a great loss, at approximately only 50% of the cost as found by the Court, and less than 35% of the cost shown by Commodities.

ing prices by the Emergency Court of Appeals. An owner of property who considers that a ceiling price is too low and hurtful to him can get no redress by proving that fact. He can obtain a judgment requiring an increase in price only if he can show that the determination of O. P. A. was arbitrary or capricious.

Thus, subdivision (b) of Sec. 924, of U. S. C. A. Title 50 App. provides as follows:

> "(b) No such regulation, order or price schedule shall be enjoined or set aside in whole or in part unless the complainant establishes to the satisfaction of the Court that the regulation, order or price schedule is not in accordance with law or is arbitrary or capricious."

It has been held in a number of cases brought in the Emergency Court of Appeals that the Court may not substitute its judgment for the judgment of the Administrator (*Madison Park Corporation* v. *Bowles*, 140 Fed. [2d], 316). But as shown in the Third Point, *infra*, this Court, in the *Cors* case, held that just compensation was a matter concerning which a person whose property had been taken had a right to a judicial determination.

In this connection it is proper to point out that Commodities was no War Profiteer but sold eight million pounds, nearly one-third of all of its pepper, in the face of the prospect of war (Spec. Fdg. 5, R. 13-14).

The above matters are all discussed more at length in one or more of the following points, but are here stated briefly to destroy the Government's argument that because it was Wartime, Commodities had no right to hold its property until it could get a fair price for it and had no right to get a fair price for it when requisitioned. Six and one-half cents does not seem to be a fair price

for a commodity which was selling for $2.00 in countries where there were no restrictions (R. 78-79).

In this connection it may be proper to point out that pepper is not a necessary food, or a food at all but is merely a condiment and a luxury. Its use is so small, only ⅛th of one pound per annum per person in the United States (R. 49-50) that to claim that its use for civilian consumption was in any way important to the conduct of the War and that the regulation of its price was in any way important to avoid inflation was just ridiculous. It was so held by the United States District Court of the District of Columbia in case No. 23573 brought by Commodities Trading Corporation to enjoin the requisitioning by Federal Surplus Commodities Corporation and officials of the Department of Agriculture of 22,000,000 pounds of pepper in March, 1944, which included nearly all of the pepper in the United States at that time (Stipulation, R. 130 and R. 131).

THIRD POINT.

An analysis of the language of the Act of October 16, 1941, the Emergency Price Control Act of January 30, 1942 and the Act of March 27, 1942, amending the October 16, 1941 Act, clearly shows that it was not the intent of Congress to permit the taking of private property at a bureau fixed price, but, on the contrary, it was the Congressional intent that requisitioned property should be justly compensated for in accordance with rules previously laid down by this Court.

The following discussion is somewhat repetitious of the first point but goes into the question more deeply. As stated in the foregoing point Commodities has invoked the aid of the Act of October 16, 1941, as amended, and is proceeding thereunder. The United States has contended that the Emergency Price Control Act limits, in fact if

not by its terms, the recovery to which Commodities is entitled. Two following considerations answer the Government's contention:

(a) This Act was passed in wartime and only a few months after the October 16th Act. But no exception is made in favor of the Government of the United States with respect to the provisions of sub-division (d) of Section I quoted in Commodities' First Point as follows:

> "Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodations for rent."

Indeed no reference whatever is made in the Act to the requisitioning of private property or to the October 16th, 1941 Act.

Both the said Act of October 16, 1941, and its amendment enacted on March 27, 1942, Chapter 199, 56 Stat. 181, provide that the Government, under certain circumstances, may requisition property, for which property, however, the Government is directed by the language of each of those Acts to make just compensation to the owner, as required by the Fifth Amendment to the Constitution of the United States. Nothing whatever is said in either about limiting said "just compensation" to prices determined under the power granted by the Emergency Price Control Act. In fact, no reference is made in the said amended October 16, 1941 Act to the Emergency Control Act, which had been passed only a few weeks before. Those three acts each conferred broad powers over private property, and if any one of them had been intended to have any effect upon any other, some reference thereto would have been made.

It was said by Mr. Justice Jackson in the *Felin* case that War does not suspend the Constitution. While that

was in a dissenting opinion, no member of this Court has taken issue therewith, so far as we know.

However, the property here in question was not seized under any general powers invoked by reason of a state of War, but was requisitioned formally under the said Act of October 16, 1941 as amended.

As Congress clearly intended that no one should be compelled to part with his property at ceiling prices fixed under the Emergency Price Control Act, it would be a plain violation of that intent if the Government could compel an involuntary sale through the instrumentality of a requisition and limit the owner's compensation to the ceiling price.

(b) As above stated, the War Powers Act of October 16, 1941, which was passed in peacetime, but at a time when War looked possible, if not probable, provided for the requisitioning of property in peacetime as well as in War, and provided for the payment of just compensation for requisitioned property, in accordance with the requirements of the Fifth Amendment to the Constitution of the United States. It made no distinction between requisitions made in peace and those made in wartime. However the Act contained a provision that such property should be paid for *"on the basis of the fair market value of the property at the time it is requisitioned."*

Within two months after the passage of the Price Control Act, the Act of October 16, 1941 was amended by the Act of March 27, 1942, as above stated. The amended Act, while conferring the same power to requisition, and containing the same provisions with respect to the payment of "just compensation", in accordance with the Fifth Amendment to the Constitution, omitted, however, the phrase *"on the basis of the fair market value of the property at the time it was requisitioned"*, contained in the Act as first passed.

Congress realized that the retention of the above phrase, after the passage of the Emergency Price Control Act, might lead to complications and attempts to get away from the plain requirements of the Fifth Amendment to the Constitution. It wished to avoid claims such as those actually made herein by the Government; namely, that in determining the just compensation provided for by the Act of March 27, 1942, a bureau-fixed ceiling price which would be, of course, the only legal market price, might be substituted for a judicial determination based on relevant facts and made according to well established precedents.

The foregoing taken in connection with the First Point seems to require an overruling of the claims of the United States with respect to the alleged errors made by the Court of Claims and specified by the United States in its assignment of errors as:

> (1) In failing to hold that the maximum price in effect at the time the pepper was requisitioned, validly established by the Office of Price Administration, was the proper standard of just compensation therefor.
>
> (2) In holding that the determination of just compensation in time of war or national emergency must take into account "the plaintiff's right to hold its property until restrictions on its disposition are removed" and "his right to hold his property until he can get for it whatever any one is willing to pay."
>
> (3) In fixing as just compensation for the pepper requisitioned an amount in excess of the maximum price therefor at the time of the requisition, as fixed by the regulations of the Office of Price Administration.

And Commodities submits that the maximum price established by the Office of Price Administration shou' ' not be

held to measure just compensation in any case where the requisitioned property was not perishable and could as a practical matter have been held until after price control had ended.

Whether or not this Court agrees that the maximum price should not control in *any such case* the following points will show that the maximum price should not be controlling or even relevant in this case and that the United States could hardly have selected a poorer case for testing out its broad claims with respect to the effect of ceiling prices.

FOURTH POINT.

The case of United States v. Cors, 337 U. S. 325, which was relied upon to a substantial extent by the Government in its briefs upon the two applications for certiorari in this matter, does not support its contentions, but does state certain fundamental rules supporting Commodities.

While the facts of the *Cors* case are so different from those in the case at bar that the decision has no direct application here, and while that was a five to four decision, there were two fundamental rules of law stated therein which do have application here, and upon which all members of the Court seemed to be in agreement. They were:

> *First*: That the determination of just compensation under the Fifth Amendment of the Constitution is a matter for judicial determination; that it cannot be changed by Act of Congress, and that the previous interpretations thereof by this Court must stand.
>
> *Second*: That market price should not be a fetish.

Commodities interprets the above to mean that the determination of just compensation in this case must be

made by this Court's taking into account all relevant factors showing what Commodities lost by reason of the taking of its property, and that such factors should be considered and dealt with in accordance with the previous determinations of this Court, free from restraint by any Acts of Congress or by the single circumstance of a market price, if one existed.

FIFTH POINT.

There was no free market in the United States for whole black pepper after a ceiling price was fixed and no market at all from prior to January 1st, 1944 until after October of that year.

The few facts referred to in this point which were not found are supported by the undisputed testimony and error was assigned for failure to find. (See assignments 35, 43.) The point and the facts are in support of an award above the ceiling price.

Upon the above point the Court of Claims found:

> "15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stocks had become impractical because of war conditions" (R. 18).
>
> "18. During the years 1943 and 1944, which was during the period of shortage of pepper and de-

mands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agents.

"This imitation pepper sold for approximately 16 cents a pound.* During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound" (R. 18-19).

"19. In October 1944, subsequent to the requisition of the pepper in this case, the ceiling price of whole black pepper was increased by the Government from 6.5 cents to 10 cents per pound. There was no pepper being offered in the United States at the 6.5 cents ceiling price in any month of the year 1944 before October. Prior to increasing the ceiling price, the Office of Price Administration and the Department of Agriculture had obtained an informal agreement from Commodities to sell about seven million pounds of its pepper at the 10-cent price, and after the price was so increased in October 1944 Commodities did sell approximately seven million pounds of pepper at that price (R. 19).

"In March 1946, following similar negotiation between Commodities and the Government, the ceiling price of whole black pepper was increased to 16 cents per pound and thereafter Commodities sold its remaining inventory of pepper, amounting to about three million pounds, at that price (R. 19).

"These increases were made in order to obtain a distribution of pepper which was not obtainable at the lower ceiling prices, and were made only after negotiations by the Office of Price Administration

*This was an O.P.A. ceiling price.

with Commodities and other dealers in pepper, to the end that large quantities of pepper would be sold upon such increase in ceiling price" (R. 19).

The above findings show definitely that there was no market at the time of requisition or for five months prior and five months thereafter.

This, Commodities submits, shows that market value based on ceiling price, does not enter into this matter and distinguishes this case from those cited to this Court and to the Court of Claims by the United States.

However as the United States has sought to emphasize sales some two years prior to May 1944 and after a ceiling price was fixed Commodities will show the facts and findings as to those matters.

The Court of Claims found:

"11. During the period immediately subsequent to the issuance of the price schedule of 6.75 cents per pound, and prior to February 3, 1942, prices for Lampong type whole black pepper did not reach 6.75 cents per pound, the price established as the maximum by the price schedule. During the month of January 1942, for example, the highest daily price was 6.45 cents per pound, with the average for the month of 6.41 cents per pound. These sales were made by certain traders in pepper, importers, and grinders, particularly those who held smaller lots because they realized it would be impossible for them to obtain a greater price than the ceiling, and therefore they sold rather than hold the pepper indefinitely and incur the cost of holding. There were large stores of whole black pepper in the country at the time of the imposition of the 6.75 cent ceiling price" (R. 16).

and in "15", it found as above quoted:

> "15. After December 1941 when the Government imposed price ceilings on pepper, there was no free and open market in the United States for pepper. All sales thereafter were subject to ceiling prices until August 1946, when ceiling prices were removed. Upon the establishment of price ceilings the traders and importers rapidly disposed of their stocks to wholesalers and grinders. However, there was progressively less activity from approximately the middle of 1942 as importers, other than Commodities, disposed of their holdings, and replenishment of their stock had become impractical because of war conditions" (R. 18).

The prices obtained on these sales were, moreover, depressed prices, depressed by reason of the effect of the ceiling price itself as stated by the Court of Claims in Finding 11 and by the following facts, among others:

> The dumping of pepper on the New York market by the War frightened East Indians; the hostile attitude of the Government, as represented by Mr. Leon Henderson, who criticized the purchases of pepper and required the New York Produce Exchange to quadruple its margin requirements; and the piling up in the United States in the hands of importers and traders of nearly 100,000,000 pounds of Whole Black Pepper (R. 89-90, 108-109, Spec. Fdg. 8, R. 15).

Whatever may be said of the importance of the market in 1942, seldom would a market in 1942 be proof of market value two years later. However, in the present case, a tremendous change between 1942 and 1944 was definitely shown, which would make it ridiculous to claim that the

market in 1942 was any proof of 1944 value. Thus, the 100,000,000 pounds of Whole Black Pepper held by importers in March, 1942 (Spec. Fdg. 8, R. 15), which was practically all of the Whole Black Pepper in the world (R. 45), had been reduced to 30,000,000 pounds by September, 1943 (Fdg. 14, R. 18). This reduction had taken place despite the fact that rationing had been brought down by degrees prior to May 1944 to only 40% of normal prewar consumption (Fdg. 13, R. 18).

Moreover, the undisputed expert testimony showed that pepper would have sold for more than 80 cents a pound in New York in May 1944, despite the rationing, if there had been no ceiling price (R. 60), and that it was actually selling at that time for as much as $2.00 a pound in countries where there were no restrictions (R. 79).

In addition, between March 1942 and May 1944, the Japanese invasion of Sumatra had taken place with great and lasting damage to pepper plantations and pepper production (R. 46, 102).

SIXTH POINT.

Whole Black Pepper is not Perishable but Lasts Indefinitely and is Easily Stored. The Reasoning of no one of the Justices of this Court in the Felin case* has any application to the Case at Bar.

The few facts referred to in this point which were not found are supported by the undisputed testimony and error was assigned for failure to find. (See assignments 35, 43.) The point and the facts are in support of an award above the ceiling price.

On the above point the Court of Claims found as above shown:

> "25. Whole black pepper is not perishable and will last unimpaired in quality for several decades" (R. 22).

*United States v. Felin & Co., 334 U. S. 624.

As above stated it is not of importance as an article of food and the average annual consumption in the United States is only one-quarter of a pound per person per year including that used by meat packers and sausage makers (Tr. 26). Whole black pepper is easily stored and plaintiff could have held its pepper until the end of the war at an overhead of only approximately one-half of one cent per pound per year, as found by the Court of Claims (Fdgs. 21 and 24, R. 19-20, 21-22).

This Court in the *Felin* case, above referred to, by no means held that the ceiling price was the measure of just compensation, particularly where the property taken was not perishable.

The majority opinion reversed the Court of Claims upon the ground that its finding of fact with respect to the cost of replacement was not sustained.

In a concurring opinion Mr. Justice Reed with whom Mr. Justice Black and Mr. Justice Murphy concurred, said: "* * * I believe that whenever *perishable* property is taken for public use under controlled-market conditions the constitutionally established maximum price is the only proper standard of 'just compensation'" (p. 643). He later said with respect to the effect of the ceiling price:

> "It would be anomalous to hold that Congress can constitutionally require persons in the position of the respondent to sell their perishable property to the general public at a fixed price or not to sell to anyone and later to hold that the Government must pay a higher price than the general public where it requisitions the perishable property because of a replacement cost, greater than the fixed price. It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less

> severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction. The two situations are so parallel that the constitutionally established maximum price may, under the circumstances here, be properly taken as the measure of 'just compensation.' That lawfully fixed market price determines what the perishable article can be sold for or its market value in any real sense. It gives to the condemnee any profit for increased value in his hands and takes nothing from him that he could lawfully obtain since consequential damages for loss of good will cannot be obtained. Such maximum price is 'just compensation' " (pp. 645-6).

Throughout this opinion stress is put upon the fact that the property seized was *perishable*.

The opinion of the Court of Claims includes the above quotation, and italicizes therein the word "perishable" wherever it occurred. It will be seen that said word occurred four times in the short excerpt.

On the other hand, Mr. Justice Jackson, with whom Mr. Justice Douglas concurred, states as follows:

> "It is hard to see how just compensation can be the legal equivalent of a controlled price, unless a controlled price is also always required to equal just compensation. It never has been held that in regulating a commodity price the Government is bound to fix one that is adequately compensatory in the constitutional sense, so long as the owner is free to keep his property or to put it on the market as he chooses. If the Government were required to do so, the task of price regulation would be considerably, if not disastrously, complicated and retarded. It seems quite indispensable to the Gov-

ernment itself, for the long-range success of price controls, that fixed prices for voluntary sales be not identified with the just compensation due under the Constitution to one who is compelled to part with his property.

"The war did not repeal or suspend the Fifth Amendment. *United States* v. *New River Collieries*, 262 U. S. 341, 343; *United States* v. *Cohen Grocery Co.*, 255 U. S. 81, 88. But it is obvious that the constitutional guaranty of just compensation for private property taken for public use becomes meaningless if the Government may first, under its 'war powers,' fix the market price and then make its controlled figure the measure of compensation" (pp. 651-2).

The Justices who took the view that the ceiling price did measure just compensation *where the property taken was perishable* did so, upon a practical and realistic view of the situation, holding that because the owner had to sell perishable property and could not sell above the ceiling price, the ceiling price measured all that he could get and therefore all that he lost when his property was taken. The three Justices, however, who joined in the prevailing opinion, apparently disagreed with the view taken by Justices Reed, Black and Murphy.

Thus, in the prevailing opinion, Mr. Justice Frankfurter stated:

"We are not passing on the abstract question whether a lawfully established maximum price is the proper measure of 'just compensation' whenever property is taken for public use. We are adjudicating only the precise issues that emerge from this case" (p. 630).

As the issue presented to the Court concerned perishable property the whole question might easily have been determined and the same result reached, by a brief and simple route,—instead of by a laborious analysis of the facts, if a majority of the Court had agreed with the view of Mr. Justice Reed, above stated. It is plain therefore that those justices were not ready to accept the thesis that ceiling price measures just compensation even where the property taken is perishable.

The ninth Justice, Mr. Justice Rutledge, concurs in the result and agrees in part with the prevailing and concurring opinions, but, on the precise subject here under discussion, he says:

> "It may be, as my Brother Reed and those who join with him think, that the ceiling price in a War-time controlled market should furnish the measure of Constitutional just compensation for the property of a highly perishable nature" (p. 647).

The Justice, however, rested his decision upon the failure of Felin to sustain the burden of proof of replacement cost.

Other facts in the case at bar, beside the lasting quality of pepper, are entirely different from those which impelled the conclusions of Mr. Justice Reed. Thus, he says:

> "It is true that the United States by exercising its power of requisitioning compelled the respondent to sell to it; but the compulsion to sell to the general public at ceiling prices was hardly less severe. The choice was between sales at the fixed price or, at the best, economic hibernation and, at the worst, economic extinction" (pp. 645-6).

This is a powerful argument in favor of the view taken by those Justices, but it has no relation to the question here presented and to Commodities' property.

The opinion of the Court of Claims states as follows:

> "This so-called retention value is particularly applicable in this case. Plaintiff, Commodities Trading Corporation, was not a trader in pepper. It was rather an investor in pepper. It began accumulating pepper in 1933 and by Pearl Harbor Day in 1941 it had accumulated a stock of 21,000,000 pounds. It was accumulating this stock in the expectation that there would be a considerable rise in the price of pepper, at which time it expected to dispose of it. * * * Commodities Trading Corporation bought most of its pepper at low prices in anticipation of the rise in price which the history of the industry showed must inevitably come. Except for the fact that the Government requisitioned its pepper, Commodities would have held it until the next rise in price and then would have sold it. It has been denied the right to do this by the Government's requisition" (R. 40).

While the above is quoted from the opinion and the Court of Claims made no findings to cover the situation, the facts proven fully covered the same (R. 52-53, Tr. 32-37, Spec. Fdg. 5, R. 14). Requests to find those facts were made to the Court of Claims and the failure of the Court to find such facts is raised by petitioner's assignment of errors with respect to such failure (Assignment of Errors 13, 14, 20 in Petition, pp. 15-16).

Hence, the objection of "economic hibernation or extinction" does not apply to Commodities which was not a dealer in pepper, did not have to sell and did not even wish to sell.

Thus the situation of Commodities and that of the Felin Co. were as far apart as the poles.

Moreover, the limitation of the ceiling price was suggested upon the practical ground that as *Felin* could not

have obtained more than the ceiling price upon a sale and as he had to sell his perishable property he did not suffer a loss in excess of the ceiling price when his property was requisitioned.

However, here again Commodities' situation was entirely different. In May, 1944, it had many outlets for its pepper in excess of the 6½¢ ceiling price as shown in the following point.

SEVENTH POINT.

The regulations of O. P. A. themselves afforded to Commodities Trading Corporation, and other importers, many opportunities to sell their pepper in May 1944 at prices far in excess of the 6½¢ general ceiling price. This fact constitutes another direct distinction between the case at bar and the Felin case and also a basis for determining value in excess of 22¢ per pound.

The foundation of the argument set forth in the quotation from the Opinion of Mr. Justice Reed in the *Felin* case was not only that Felin had to sell his perishable property but that he could not obtain therefor more than the particular ceiling price in question.

In the case at bar, plaintiffs proved numerous opportunities afforded by the O.P.A. Regulations themselves for the sale by Commodities of its pepper at prices far in excess of the said general 6½¢ price. These instances included the following:

(a) *Use of its pepper for the making of synthetic or imitation pepper and the selling of same at an O.P.A. ceiling price to return from 25 to 30¢ a pound for the pepper* (Spec. Fdg. 18, R. 18-19).

(b) *The sale of its pepper in less than one bag lots.*

(c) *Sales to Porto Rico, Hawaii and Alaska at special O.P.A. prices far in excess of the 6½ cent price* (Fdg. 20, R. 19, O.P.A. Price Regulation 52, Tr. 154).

(d) *Sales to South America at prices far in excess of the New York selling price.*

(e) *Grinding the Whole Black Pepper and selling it at 12 cents a pound, the ceiling price for ground black pepper.*

Considering more in detail the above outlets for Commodities' pepper in excess of the 6½ cent ceiling price:

(a) *Synthetic or imitation pepper.*

On this point the Court of Claims found as above quoted:

> "18. During the years 1943 and 1944 which was during the period of shortage of pepper and demands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.
>
> "This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound • • • " (R. 18-19).

The cost of grinding Whole Black Pepper was only a fraction of a cent per pound (R. 106).

The Court can take judicial notice that parched corn, wheat and cotten seed hulls are cheap ingredients. Thus, one thousand pounds of ground pepper mixed with three thousand pounds of these cheap adulterants could be sold in bulk at an O. P. A. ceiling price of $640.00. If only half of this is attributed to Whole Black Pepper, 32¢ would be realized for each pound thereof. There would have been little or no cost of selling (R. 106).

It sold for 16¢ or better (R. 106).

The 16¢ price was an O.P.A. ceiling price (R. 106, 107). But in any case if Commodities could sell for that much its pepper was worth that much.

They were paying $2.00 a pound for it in much poorer Countries (R. 72).

(b) *Sales in less than one bag lots.*

Whole Black Pepper in hands of bulk dealers, in which class was Commodities Trading Corporation (see F. D. O. 19), could be sold in quantities less than one bag (150 lbs.), free from restriction of said ceiling price (see Regulation 52 of the O. P. A.).

The said F. D. O. 19 put restrictions and limitations upon sales and established quotas, and Commodities understands that the War Food Administration contended that bulk dealers in which class said F. D. O. puts Commodities were subject to those restrictions, even though they are applied specifically only to packers and grinders and other receivers of pepper. As they had no quota, it was contended that they could not sell generally.

However, said F. D. O. 19 provides as follows:

> "(2) Any person may, without charge to his quota, deliver or accept for delivery any restricted spice to any of the following persons, or may use any restricted spice in the manufacture or processing of any product to be so delivered, or for replacing in his inventory any restricted spice so delivered or used:
>
> "(i) The Army, Navy, Marine Corps, Coast Guard, War Shipping Administration, or any other governmental agency designated by the Director, or any agency of the United States Government for supplies to be delivered to, or for the account of, the Government of any country pursuant to the

Act of March 11, 1941, entitled 'An Act to Promote the Defense of the United States' (Lend-Lease Act).

"(ii) The American National Red Cross or the United Service Organizations, Inc.

"(iii) Any person operating an ocean-going vessel engaged in the transportation of cargo or passengers in the foreign, coastwise, or intercoastal trade, for necessary supplies for such vessel."

The cost of those sales would have been negligible (see testimony of Government's Witness, Squires, Head of Spice Division of O. P. A., R. 106).

(c) *Sales to Porto Rico, Hawaii and Alaska.*

A further opportunity to sell for prices far in excess of the said ceiling price was furnished by the Regulations of O. P. A. with respect to sales to Porto Rico, Hawaii and Alaska (Fdg. 20, R. 19). An entirely different method of measuring ceiling price in sales of that kind was provided from sales in Continental United States. The ceiling price was either 10% above the O. P. A. ceiling price in Continental United States, plus 125% of the prewar percentage markup or cost plus a percentage (O. P. A. Price Reg. 52, R. 103).

As Commodities had paid much more than 6½¢ for some of its pepper, and as its mark ups on foreign sales had been substantial, the above rules gave it an opportunity to sell at prices more than double the ceiling price, and plaintiff did in fact sell substantial quantities of pepper to Porto Rico for 14.19¢ per pound (Fdg. 20, R. 19; R. 90-92).

While these sales were made in 1945 and after the ceiling price had been increased to 10¢ per pound, the same opportunity to sell at the same price existed in May 1944, as those sales were made on the basis of cost plus allowance of export profit.

(d) *Sales to South America.*

A still further opportunity to Commodities and others to sell for prices far in excess of said 6½¢ ceiling price was furnished by the O.P.A. Regulations with respect to sales to foreign countries. These were substantially the same as the sales to Porto Rico, Hawaii and Alaska, but in this case the opportunity to sell was not unrestricted as in the case of those sections of the United States, but export licenses were required (R. 71). However our Good Neighbor Policy required the United States to share its dwindling supply of pepper with South America, and export licenses were issued to many holders of Whole Black Pepper, including Commodities, which was allowed to fill orders from Argentina for 35,000 pounds at the equivalent of 21¢ a pound* (R. 41, 70-71, 90-92).

(e) *Sales of ground pepper.*

Dealers in the same classification as Commodities had the opportunity of grinding their Whole Black Pepper and selling it for the ceiling price of 12 cents and more per pound (R. 45, 6). The grinding cost was but ½ cent a pound (R. 106) and the selling price was negligible, as the Government's witness, Squires, testified that a line would form in front of the premises of any person who could sell ground black pepper lawfully at 12½ cents a pound (R. 106).

Thus, it is seen that the whole foundation for the opinion of Mr. Justices Reed, Black and Murphy in the *Felin* case is entirely lacking in the present case, as there were many opportunities for plaintiff, Commodities, to sell far in excess of the ceiling price. Therefore the value of its pepper to it was much more than 6½¢ and it suffered a loss of much more than 6½¢ through the taking thereof by the Army.

*The actual price obtained for this pepper was 30.93c to 32.31c per pound for white epperr, but black pepper may be transformed into white pepper by the removal of the outer shell and at a total cost, including such loss, of 1/3 (Tr. 120-121).

EIGHTH POINT.

The Market Price of Indian Pepper was a measure of the value of Commodities' pepper and fully Sustains an Allowance of at Least 22¢ a Pound as Just Compensation for Commodities' Pepper Requisitioned on May 26, 1944.

The Court of Claims found with respect to the above:

"Next to Sumatra, British India is the largest producing country of black pepper. However, British India uses approximately 75 percent of the pepper it raises and exports the balance.

"Prior to 1944 and in 1944, the Allied Food Commission did allocate 10,000,000 pounds of pepper for the United States. During 1944 the price per pound of whole black pepper in India fluctuated, as follows:

	Cents		Cents
February	21.25	July	19.71
March	21.20	August	19.40
April	18.55 to 19.00	September	16.90
May	20.00	October	19.76
June	20.99		

"These prices included insurance and freight and to New York. In other words they were prices delivered in New York.

"However, because Office of Price Administration Regulation, R. P. S. 52, provided that no one could purchase or import pepper at higher than the maximum prices established in that schedule, *i. e.*, 6.5 cents per pound, American importers were unable to take advantage of the allocation of British pepper" (Spec. Fdg. 23, R. 21).

There is no difference in value between Indian pepper and plaintiffs' pepper (R. 39).

There was a free market in India in that there was no ceiling and the Indians could trade with each other freely (R. 64). There was a depressed market, however, because the British Government had put restrictions upon the exportation of pepper from India (R. 41-42, 46-47, 63-64, 61, 81). Otherwise, the price would not have been 21¢ delivered in New York and the price in South America $2.00 (R. 41-42, 79).

By May 1944, Commodities owned approximately 60% of all the pepper left in the hands of importers in the United States, and all the import pepper was concentrated in a few hands (Spec. Fdg. 14, R. 18). There was a loud public clamor for pepper in the Press and in Congress, and the fact that in these circumstances O.P.A. refused to permit the American public to supply itself with pepper at an import cost of less than 4¢ per individual per annum (R. 61-65), by letting in the Indian pepper, shows that there was a definite determination on the part of O.P.A. to force the liquidation at low prices of the pepper held by importers in the United States before letting in this Indian pepper.

It is not important whether this was a proper or improper action on the part of O.P.A. The real question is:

Can the Government prevent trading and a market in the United States and then reject the prices in India which would have prevailed here as evidence of value?

While Indian pepper was not imported in the year 1944, it was in 1945. O.P.A. permitted the Commodity Credit Corporation to buy 300 tons of Indian Pepper and pay the full market price of 23½¢ per pound (R. 47). This was enough pepper to supply every man, woman and child in the United States with the average consumption for a fortnight (R. 50). That pepper was sold by Commodity Credit Corporation to exporters in New York (the classification in which Commodities Trading Corporation was placed), at cost and was sold by them to South Amer-

ica for as much as $1.00 a pound. All with the permission of O.P.A. (R. 47-48). There was no change of conditions between 1944 and 1945 (R. 48).

In addition the Army recognizing the impropriety of making requisitions against the short supply in the United States while there were large untouched supplies available in India, arranged to purchase through Commodity Credit Corporation many hundred tons of this Indian Pepper, which it handed over to the grinders in the U. S., who ground it and packed it in regulation packages for the Army (Tr. 24, 25). That pepper was bought by the grinders at between 21¢ and 23¢ a pound (Tr. 22-24). Finally, at the end of the War, and during control, several hundred tons of this Indian pepper was brought into the U. S. by the Department of Agriculture, which permitted grinders to buy the pepper and to sell it for civilian consumption in the U. S. That privilege was restricted to grinders (Tr. 24-25). Thus there was an actual market in Indian pepper in 1945.

The Indian market price is stated in Finding 23 as May 20¢, June 20.99¢. The May price is an error, probably typographical. The testimony upon which the finding was based was "May 20.99 and June same price" (R. 42). This is the cost delivered at the dock. It must then be handled, carted and stored (Commodities' assigned errors to above finding, No. 30, p. 17, *supra*).

NINTH POINT.

Plaintiffs' claim of 22¢ per pound is only what Commodities could reasonably have realized in May 1944 had no war intervened, and just compensation should not be fixed at any lesser price.

The War caused great destruction of pepper and pepper gardens and cut off Sumatra from the rest of the world (R. 45). This caused a great permanent increase

in the actual value of pepper, and a rise in price, where uncontrolled, to nearly ten times that claimed by Commodities herein (R. 62) and more than thirty times the O.P.A. ceiling price. Would it not be a travesty upon justice if in these circumstances just compensation for Commodities' pepper should be fixed at an amount less than it could have obtained, had there been no War?

With respect to the above the Court found:

> "If there had been no war in 1941, it is probable that production of pepper in Sumatra would have decreased each year after that until about 1945 or 1946, when the new plantings would have begun to bear. This decreased supply during the period from 1942 to 1945 or 1946 would have had effect in raising pepper prices in the United States" (Spec. Fdg. 26, R. 22-3).

While the Court did not find the amount of the increase in price referred to above and while no witness stated it in cents per pound, the evidence and findings show that any reasonable estimate would put the total price above 20¢ in May 1944.

Thus, in addition to the portion of Finding 26, quoted above, we have the following:

(1) The graph found in Finding 9 (R. 16) which shows the history of pepper prices for seventy-five years before the War. This shows that for 75 years every time pepper prices fell below 6 or 7 cents, they soon climbed back to above 15 cents, and usually to from 20 to 40 cents and that there was great regularity in the cycles—about 7 years from bottom to top and seven more to bottom again.

So long and so regular a succession of cycles by itself showed a high probability of repetition in the future.

(2) In Finding 26 (R. 22-23), the reason for the cycles was shown as follows:

> "The plant does not bear any fruit for the first four years, during which constant cultivation is required, but then has a bearing period of from ten to fifteen years with an average bearing period of about eleven years. The effect of high prices for pepper is usually to stimulate planting, while low prices retard new plantings and sometimes lead to neglect of established vines.
>
> "The 1926 Lampong crop was the smallest in history, with the result that prices reached the highest levels ever recorded; this greatly stimulated planting, leading to a period of very low prices some five years later. This in turn reduced plantings. The consequent reduction in crop was first noticeable, so far as its effect on prices was concerned, in 1937, 1938, and 1939, and by 1941 had had sufficient effect in raising prices so that new plantings might have been made in 1942."

The conclusion in the finding above, that it was probable that production of pepper in Sumatra would have decreased each year after 1941 until about 1945 or 1946 is a great understatement. Humanly speaking, it was inevitable.

As the Court of Claims found in said Finding 26, the pepper vine does not produce at all until four years after planting and continues to bear only eleven years after that. So in 1941 all of the pepper vines which had been planted 14 or 15 years previously, as a result of the abnormally high prices, of 1926 were dying of natural causes, and each year vines which had been planted in later years would die. Continued new plantings were always required to maintain a supply of pepper (R. 99-100). There were no new plantings from 1937 up to the time of the Japanese invasion in March 1942 (R. 101-102).

(3) In addition an important dealer who had been familiar with the pepper market for 20 years testified that in 1941 the price of pepper was on its way up and that he knew of no reason why pepper prices should not follow the form of the usual cycle and that by 1944 they would have been in his opinion in excess of the average price, and well on the way to another top (R. 81).

Pepper prices had actually increased from a price of 4.1 cents a pound in January to 6.75 cents per pound by December of that year (Spec. Fdgs. 9 and 10, R. 15-16).

While the Findings of the Court of Claims are probably sufficient to support Commodities' claim in this point, the proof was much stronger than the findings, and Commodities in its Petition for Certiorari, assigned as errors the failure of the Court to find in accordance with the evidence, and, to a certain extent, against the evidence (Assignment of Errors 17 and 18).

For instance, the Court makes no distinction between the time when the pepper vine begins to bear at all and the time when it begins normal production. All of the witnesses, including the witness Squires, former Chief of Spice Division of O. P. A., called by the United States, testified that it was seven years and not four years before there was any considerable yield from the new pepper vines (R. 107).

Thus, instead of there being "a decreased supply during the period from 1942 to 1945 or 1946", only such decreased supply would have continued until 1949.

This Court can take judicial notice of the fact, so commonly known, that the wholesale price of pepper has been approximately one dollar, for most of the period following decontrol, due to this very fact.

Furthermore, the Court of Claims assumed that there would have been plantings of new pepper vines in 1942, if there had been no war. There was no justification for this whatever, as there had been no plantings of new pepper in 1941 or 1942, up to the time of the Japanese invasion

in March of that year (R. 101-102). Moreover a price below 7¢ has usually checked planting over the 75 year period shown on the graph in Finding 9 not stimulated it (R. 16, 81).

With all the wealth of information and statistics at the command of the Government, not one word of evidence was introduced in contradiction of any claims made by Commodities.

As the Attorney-General below argued that the war was a boon to Commodities, and pointed out the 78 million to 100 million pounds of pepper which was held by United States importers in March 1942 (Spec. Fdg. 8, R. 15), and will doubtless repeat such argument, it may be proper to point out at this place that the United States stock was nearly all of the pepper that there was in the world in March 1942 (R. 45) and had been reduced to 28 million pounds by September, 1943 (Spec. Fdg. 14, R. 18). This 28 million pounds was much less than one year's supply for the United States (R. 89) and only about a three months' supply for the world (R. 68). Moreover, the above mentioned great reduction in stocks had taken place between March 1942 and September 1943, despite the fact that rationing was imposed upon pepper dealers at an early period, and the severity thereof was steadily increased until the quota was reduced to 40 per cent. of prewar consumption by the first quarter of 1944 (Spec. Fdg. 13, R. 17-18).

The undisputed evidence showed that pepper was an expensive and troublesome vine to plant in the first instance, and that it required continuous care and fertilization throughout its life (R. 98-99).

In order to start a pepper garden, a space must be cleared in the jungle. A special kind of tree must be obtained from another portion of the jungle and transplanted to the clearing. The pepper vine is then planted near the living tree and climbs up upon it. If constant care is not exercised, the jungle will reclaim the area taken from it.

The large production spoken of by the Court of Claims in the above quoted finding had the effect of depressing the price from 42¢ down to 3 cents a pound, the lowest known to modern history. This put a stop to practically all plantings in 1937, 1938, 1939, 1940 and 1941, and brought about the abandonment of a number of producing gardens (R. 43, 66-68, 101-102). So great was the effect of this that the 1941 crop was 40% smaller than the average crops of the immediately preceding years (R. 100).

The failure of the Court of Claims to find in accordance with the above Commodities assigned error.

TENTH POINT.

Retention value is a fair and reasonable measure of just compensation for requisitioned non-perishable, easily stored property, where the cost of holding and future market price can be foretold within reasonable limits.

The Court of Claims in its opinion said:

> "This so-called retention value is particularly applicable in this case" (R. 25).

Retention Value is the value at the time of taking, based upon reasonable probabilities as to the future and as to what the market will be following decontrol. It is by no means the actual price which has followed decontrol. On that basis, petitioners would have received an award of 50 to 60 cents per pound instead of 15 cents (Spec. Fdg. 17, R. 18).

Retention value does not reflect the extreme scarcity resulting from war demands or war restrictions. On the contrary it is measured by the conditions which will exist when that scarcity has ceased, and normal conditions have been so far restored that price control is ended.

That the Court of Claims had the above conception of retention value and not the fantastic one stated by re-

spondent in its briefs to this Court on the application for certiorari is clearly shown by its opinions in *Kaiser* v. *United States*, 69 Fed. Supp. 555, and *Pantex Pressing Machine* v. *U. S.*, 71 Fed. Supp. 859.

In *Kaiser* v. *United States*, in applying retention value as the measure of just compensation, the Court said:

> "Plaintiffs, but for the requisition, could have held the material in stock for use in the manufacture of their products after the emergency had passed and priorities had ended, but this would have entailed capital tie-up, expense of storage and possibly some deterioration and obsolescence."

Thus, the Court of Claims clearly explains that retention value as considered by it was restricted to the value "after the emergency had passed and priorities had ended" and that capital tie-up, storage, deterioration and obsolescence should be considered as deductions.

After the above-quoted statement, the Court of Claims continued as follows:

> "These and other existing factors must be taken into consideration in arriving at the fair and reasonable value of the stock *at the time of taking.*"

This statement flatly refutes the contention of the Government that retention value violates the principle that it is the value *at the time of taking* which must be considered.

In *Pantex Pressing Machine* v. *United States*, the Court of Claims stated:

> "• • • nevertheless, when it (the Government) takes a person's property it must compensate him in the light of his right to retain his property, unless requisitioned, until the restrictions on its use and disposition should be removed. • • • From the

total there must be deducted an estimated amount for carrying charges for the estimated period during which the restrictions would remain in effect."

From the above it seems plain that retention value is a proper measure to apply for the ascertainment of just compensation in this case if the facts indicate within reasonable limits what the prices of pepper would be after the end of price control, how far in the future it was reasonable to anticipate that end to be, and the carrying charges of pepper from May, 1944 until such time of decontrol. As to what could be expected at the end of price control, we have the following.

The Court of Claims found:

"17. After the removal of ceiling prices in August 1946, an active market in Lampong whole black pepper came into existence. Such pepper was sold in quantity at 50 to 60 cents a pound and upward; and at 40 cents a pound and upward for future delivery in 3 or 4 months" (R. 18).

But this is hind sight, and in May, 1944 no one *knew* what the prices would be at the end of price control. However, the evidence and the findings show that a price in excess of 25 cents to 30 cents was a reasonable prediction at the time of seizure.

Thus, the Court of Claims found (Fdg. 16, R. 18):

"There was connected with the Office of Price Administration a board of advisers relating to commodities. The board of advisers for spices, including pepper, composed of leading men in the pepper industry, importers, brokers and dealers, recommended that the ceiling price for pepper be increased; that the trade would be able to keep this

commodity on what it believed would be a fair level of between 20 and 30 cents per pound; that if the prices were kept at the original levels of 6.5 or 6.75 cents per pound the market would be apt to rebound to a much higher level as of the date of decontrol."

As already stated, there was in May, 1944 a price of $2.00 per pound in certain countries where there was no price control, and the expert evidence was that even in spite of restrictions imposed by the rationing orders, the price in the United States would have been 80 cents to $1.00 per pound if no ceiling price had been imposed.

The shortage of pepper, due to the voluntary cessation of planting and the voluntary abandonment of pepper gardens in 1941 and prior years discussed in the preceding point, increased by the destruction following the Japanese invasion, made it certain that the end of the War would find the whole world with an acute shortage of pepper.

As shown by the graph, commented upon in the preceding point, whenever there was even a slight shortage of pepper there was a trebling or quadrupling of the prices.

Another important factor in connection with the price movements of pepper subsequent to December, 1941, is the fact that the price of pepper has little or no effect upon its consumption, contrary to what happens in the case of nearly every other consumable material. This is due to the fact that only one-eighth of one pound of pepper is the normal per capita annual consumption, and few people would be influenced by an increase from 6 cents to 60 cents per pound, where the consumption is so small.

From all of the foregoing, it is clear that while no one could predict exactly the price of pepper at the end of the War, and at the end of price control, it was obvious that that price would be a high one and far in excess of the price asked for in the case at bar.

As to the length of time that an owner of pepper would have to hold it from May 26, 1944 to the end of the War,

we have the fact that the end of the War was well in sight at that time. Both Germany and Japan had begun to crumble and Italy was done for. The English had repelled the threat to Alexandria and had driven the Germans back in North Africa. We had landed in their rear and a large part of the German-Italian Army had been captured. We had proceeded Northward in Italy and had nearly reached Rome, which fell a few days after May 26, 1944. Our airplanes, in connection with the English, were creating havoc in the German manufacturing centers. The Russians had repelled the great German invasion and had captured an entire German Army in front of Stalingrad. General McArthur and our Navy were conducting a most successful campaign in the Pacific.

It was obvious that the War would end in a year or so and that control of most prices, particularly a luxury condiment used in such small quantities as pepper would end within two or three years at the outside.

As to the cost which a holder of pepper would incur in connection with retaining such property until the end of price control, the evidence submitted by Commodities showed overheads of approximately ½ cent per year per pound (R. 92), but in the letter of Mr. Bowles, dated March 11, 1944, Defendant's Exhibit 3, he allows $.006232 per pound for about 1 and ¾ years, making the cost of carrying almost negligible (R. 36 and 37).

ELEVENTH POINT.

Commodities could have disposed of its pepper in May 1944 for more than 20¢ per pound and therefore its value and just compensation for the taking thereof exceeded 20¢ per pound.

The Court of Claims found:

"18. During the years 1943 and 1944 which was during the period of shortage of pepper and de-

mands therefor, spice dealers manufactured and sold in substantial quantities synthetic or imitation pepper. Imitation pepper was made up of about one-fourth or one-fifth real ground black pepper, the remainder being ground parched corn, wheat, cotton seed hulls, or other neutral agent.

"This imitation pepper sold for approximately 16 cents a pound. During this time the ceiling price on whole black pepper was 6.5 cents a pound. The ceiling price for ground black pepper was then 12½ cents per pound."

The situation here is the converse of that which existed in the *Felin* case. There the Felin Company had no outlet for its pork chops in excess of the ceiling price and some of the Justices considered that this practical situation should be controlling as to value and just compensation.

Here Commodities could have ground its pepper, mixed it with three portions of parched wheat or cotten seed hulls and could then have sold the concoction for 16¢ per pound. As there would be only ¼ pound of pepper in the 16¢ concoction, the pepper itself would sell for 4¢ an ounce. The Court can take judicial notice of the cheapness of wheat or cotton seed hulls.

The cost of grinding black pepper is only a fraction of a cent per pound (R. 106).

TWELFTH POINT.

Commodities' cost justifies and requires an allowance in excess of 20¢ per pound.

The Court of Claims found the cost of plaintiff's pepper to be 12.7¢ (Spec. Fdg. 24, R. 21-22). But in making said finding the Court stated therein as follows:

"The foregoing costs do not include any amount for officers' salaries, supervision or purchasing ex-

penses to Commodities during the period that pepper was purchased and held. No interest is computed upon costs of any of the carrying charges, but only upon Commodities' original cost."

Moreover, the Court of Claims in said finding allowed for "bank interest, commissions, cables, exchange, etc.," only 2.75% per annum.

The interest allowed was not normal of which this Court can take judicial notice.* The interest found by the Court was based on the interest actually paid by Commodities which at one time was only ⅛ of 1% per month (R. 180). But this was explained by a vice-president of the lending bank who showed that the bank had as collateral for its loans to Commodities, the guarantees of several persons of great wealth, stocks and bonds dealt in on the New York Stock Exchange for many hundreds of thousands of dollars and the pepper itself (R. 115). It was the safest possible kind of loan.

Moreover, the directors of Commodities kept balances with the bank of over $500,000 (R. 115). The bank was in effect loaning them their own money. And without risk. No wonder it was willing to do so at ⅛ of 1% at one time.

The Court of Claims in the *Cors* case considered favorably the inclusion in cost of the value of services rendered gratuitously by an owner and this Court apparently approved.

Commodities' cost with some important overheads omitted came to 14.59¢ per pound (R. 93).

The addition of the value of gratuitous services and proper overhead should bring this figure up to approximately 20 cents. Then if an allowance for holding and managing the pepper for 9 years is added, the total should not be less than 21¢ or 22¢. So also if the 12.7¢ figure found by the Court of Claims is built up by including in-

*United States v. Cors, 337 U. S. 325.

terest at a reasonable rate and applying it to *all* of plaintiffs' expenditures in connection with storing and holding its pepper, the cost found by the Court of Claims would be brought up to 16½ to 17 cents per pound even without important overheads. And if overheads and an allowance for carrying the pepper for nine years is added, the total exceeds 20¢.

THIRTEENTH POINT.

Plaintiff lost through the taking of its Pepper, Upwards of $190,000, and suffered Damage through Delay in Payment.

In the prevailing opinion in the *Felin* case, *supra*, this Court says:

> "Just compensation is a practical conception—a matter of fact, and not of fiction." (p. 641)

and further

> "In enforcing this Constitutional requirement, (the just compensation required by the Fifth Amendment, the question is 'What has the owner lost, not what has the taker gained?' (*Boston Chamber of Commerce* v. *Boston*, 217 U. S. 189, 195; *McGovern* v. *New York*, 229 U. S. 363). Respondent's sole claim is for the pecuniary equivalent of the property taken" (p. 630).

The above is precisely what these plaintiffs claim. Commodities lost 759,750 pounds of its inventory of Whole Black Pepper (Finding 3, R. 13). What must plaintiffs be paid to put them in as good a position pecuniarily as they would have been in if the property had not been taken?

There was a world-wide shortage of pepper. The Japanese had taken possession of Sumatra, and India was

the only pepper producing country which was not cut off from the allies. Destruction by the Japanese had permanently reduced Sumatra's ability to produce (R. 46), and Commodities could have sold in Latin America and other countries for as much as $2.00 a pound if it had not been restricted in exporting and in the price it could charge the foreigner (R. 79).

The pepper trade and the technical advisers of the O. P. A. had urged it for months previous to May 26, 1944 to increase the ceiling price of pepper to from 20¢-30¢ per pound and thereby permit the purchase of Indian pepper and the sale of it in the United States at reasonable profit and had warned the O. P. A. that if it refused to follow this advice, decontrol of the price of pepper would see abnormally high prices and the country and the industry would be injured (Fdgs. 16 and 17, R. 18).

At the end of price control the price of pepper immediately shot up to 60¢ per pound and soon to 80¢ (Fdg. 18, R. 18-19). In May, 1944 it was recognized that such prices would follow decontrol.

Plaintiffs' property was non-perishable, as above shown, and would last indefinitely (Fdg. 25, R. 22).

They could have held their pepper until decontrol or until offered a fair price.

From the above, it is plain that plaintiffs suffered a very real loss—a matter of fact and not of fiction. To show the extent of that loss and to measure their just compensation therefore, plaintiffs proved all of the following bases which had been used by the Courts to determine just compensation: retention value, based on amounts which could actually have been obtained as soon as price control was terminated; retention value, based upon what could reasonably have been anticipated in May 1944; market price (Indian); estimated market price in May 1944, if there had been no War; replacement value; net amount obtainable for its pepper through use as basis of imitation pepper; and cost. Each of the said bases required an allowance of more than 20¢ per pound.

However, in the face of this the Court of Claims allowed only 15¢ per pound. This is explained by the quotation from the opinion of the Court appearing at pages 22 and 23, *supra*, but as shown in the succeeding point the sales at 10¢, 14.19¢ and 16¢ respectively were irrelevant and should not have been considered by the Court of Claims. Moreover, its statement that the 15¢ figure allowed a 2¢ per pound profit over costs is clearly erroneous, as shown in the Twelfth Point, *supra*.

FOURTEENTH POINT.

No one of the Matters which the Court of Claims took into account to reduce the price of pepper below 20¢ as stated in its opinion (R. 27) was relevant and no one of said factors should properly have been given any weight.

The sale in Porto Rico was a trifling matter. It did not take place until June, 1945, more than a year after the requisition here in question (Spec. Fdg. 20, R. 19). The circumstances of the sale are not shown anywhere. The fact of the sale was proven by Petitioners in order to show that there was an outlet for their black Pepper at a price more than twice the ceiling price of 6½¢ and they showed that the provisions of Regulation #52, so far as sales to Puerto Rico, Hawaii and Alaska were concerned, were the same in May, 1944 as they were in 1945, and that therefore Petitioners had had an opportunity to make such sales in May, 1944 (Compare Reg. #52 in effect May, 1944 with amendment of October, 1944 in effect June, 1945).

It does not appear what pressure was put upon Petitioners to make this sale, nor any of the circumstances thereof. On the other hand, the President of Commodities testified that no sales had been made willingly (Tr. 101).

Neither should the sales at 10¢ have been given effect by the Court of Claims. In addition to the statement of

the President above referred to, we have with respect to these sales the fact that the Government was exercising great, and we submit, improper pressure upon Commodities to force it to sell. That it should have sold a portion of its holdings and lightened its load, under these circumstances, is no proof of the price at which a willing seller would have sold to a willing buyer nor of *just* compensation. Instances of the pressure referred to are as follows:

(1) Seizing Commodities' pepper without *any* payment, in violation of Public Law 274, 77th Cong. approved October 16th, 1941, Chap. 445, as amended (see Petition for Certiorari, p. 30; Complaint, R. 1-4; Spec. Fdgs. 4 and 7, R. 13, 14).

(2) The attempt by the Government to requisition practically all of Petitioner's pepper for civilian use (R. 135).

It is true that Plaintiffs had obtained a temporary injunction against this procedure and had defeated in the United States District Court for the District of Columbia, a motion for summary judgment by the Attorney General (R. 135) upon the ground that the statute did not authorize the requisition in question. But that action was still pending. It was War-time and a defeat anywhere along the line would have meant the loss of the pepper.

(3) The O.P.A. had broadcast a distorted and misleading statement of the cost of Petitioner's pepper and had thereby made it appear that Petitioners were grasping, war-profiteers, who were trying to collect two or three times the cost of their pepper (Respondent's Ex. 3, R. 36, 37).

(4) Pressure was put upon Commodities and OPA and the Department of Agriculture acting together exacted agreements or promises from Commodities that it would sell a number of million pounds of pepper at 10¢ (R. 104).

Moreover these sales took place more than five months after the requisition.

The sale at 16¢ was a compromise entered into with OPA and did not in any way measure a transaction between a willing seller and a willing buyer. The circumstances were much the same as the sales at 10¢ (R. 108).

The ceiling price at that time was 10¢. Commodities was demanding 22¢. It made a compromise and sold for 16¢. Moreover, this was more than two years after the seizure.

FIFTEENTH POINT.

The Government's refusal to return the excess pepper requisitioned and its selling of same for 75¢ per pound at the close of the War is relevant on the subject of the value of the Commodities pepper and is also a strong argument that some liberality should be exercised in estimating what Commodities lost through the taking of its pepper.

The Army requisitioned far more Lampong Black Pepper than it needed and had on hand large quantities at the end of the War (Tr. 201).

Efforts were made by dealers and representatives of the pepper trade to induce the Army to return this surplus pepper to the persons from whom it had requisitioned pepper, but the Army refused so to do (Tr. 200-202).

On or about the 16th day of November, 1946 plaintiff, Commodities, or its individual stockholders, said plaintiff being in the process of dissolution, were offered by the Government the privilege of purchasing a proportion of the pepper requisitioned from plaintiff, Commodities, at 75¢ per pound (Tr. 452-7, Pl.'s Exh. 5 for ident.).

This offer was accepted by some of said Stockholders (Pl.'s Exhs. 6-A, 6-B, 6-C, for Id., R. 132, Tr. 184-6).

Plaintiff's exhibits above referred to were excluded, although the testimony was admitted. Plaintiffs duly excepted upon the trial and have assigned error (Assignments 55, 56, 57, 58).

Conclusion.

This Court should overrule the errors claimed by the United States and should hold that the OPA ceiling price was not a relevant factor in determining just compensation in this case. This Court should further hold that the factors of cost; retention value; market price if there had been no war; Indian market price; and the market price of imitation pepper, each was a proper measure of the value of the requisitioned pepper and of just compensation therefor and the judgment of the Court of Claims should be set aside and it should be directed to find just compensation in accordance with the above mentioned factors and at the amount demanded in the complaint.

New York, New York, December 23, 1949.

Respectfully submitted,

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